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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 501

THE OKONITE COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Okonite Company, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit, which affirmed the decision of the Tax Court sustaining the respondent in holding petitioner liable for additional Federal undistributed-profits tax for 1936 by reason of the disallowance to petitioner of a dividend-paid credit on account of dividends paid to the holders of old 7% preferred stock of the petitioner otherwise than in cash, namely, in new 6% preferred stock.

STATEMENT OF THE MATTER INVOLVED.

In 1936 the petitioner had a large number of stockholders (both common stockholders and holders of 7% preferred stock) and bond holders. The petitioner was then in arrears as to cumulative dividends upon the 7% preferred stock to the extent of $30. per share. Such accumulation of arrears of dividends on the preferred stock had the twofold result of prohibiting the petitioner from paying any dividends on its common stock and of according voting rights to the holders of the preferred stock, share for share with the common stock, as long as such arrears continued.

The petitioner had a large earned surplus and current earnings sufficient under state laws to justify a declaration of dividends on its common, as well as on its preferred stock, but did not have sufficient cash available for that purpose, first because of its obligations relative to its bonded indebtedness, and second because all available cash was required for the business purposes of the corporation. Nor was the petitioner able to borrow funds for the payment of dividends in cash.

Since no dividends could be paid to the common stockholders until the accumulated dividends on the 7% preferred stock had been paid, and since the latter could not be paid in cash (despite the large amount of earned surplus and current 1936 earnings), a resumption of dividend payments was possible only if the 7% preferred stock should accept some plan for the payment of its accumulated dividends in stock or in some form other than in cash.

In this state of the matter the petitioner devised a plan which had a twofold purpose; namely, the creation of a new issue of 6% preferred stock, part of which would be exchanged for old 7% preferred stock to the elimination of that issue, and part of which would be paid out as a stock dividend in payment of the accumulated dividends on the 7% preferred stock.

Pursuant to such plan a new issue of 6% preferred stock was authorized and created and a dividend of $30. per share was declared on the 7% preferred stock payable in the new 6% preferred stock. The whole plan contemplated the delivery of 6% preferred in the following amounts to all of the holders of the 7% preferred who should consent thereto:

> 1.15 shares of 6% preferred for each share of 7% preferred to equalize the difference in the respective dividend rates;
>
> .10 shares of 6% preferred for each share of 7% preferred to equalize the difference between the call rate of $115. per share, with respect to the 7% preferred, and of $105. per share, with respect to the 6% preferred;
>
> .3 shares of 6% preferred in payment of the declared dividend of $30. per share on the 7% preferred.

The plan was duly approved both by the common and the 7% preferred stock, almost all of the 7% preferred stock agreeing to accept 6% stock on the above basis in exchange for the 7% stock, and in payment of the accumulated dividends. The few 7% stockholders who did not so accept were paid their dividends in cash and their stock was called for redemption at the call price of $115. per share.

The Tax Court found, as a matter of fact, that the fair market value of the new 6% stock on the date of the delivery thereof to the 7% stockholders was $89. per share.

Earned surplus and current earnings were transferred by the petitioner to capital in the amount of the 6% preferred stock paid out in the form of stock dividends, and for the purpose of equalizing the difference between the call rate of the two classes of stock. The record shows the transfer of such earnings to the capital account.

The Tax Court held that the stock dividend so paid to the 7% preferred stock was not taxable income to the stockholders and therefore that the petitioner was not entitled to a dividend-paid credit with respect thereto. The Tax

Court thus apparently held that the transaction was a "recapitalization" and thus a non-taxable reorganization under §112 of the Internal Revenue Code.

The Circuit Court of Appeals for the Third Circuit affirmed the decision of the Tax Court. The petitioner contends that such affirmance was due to a misinterpretation by the Third Circuit of *Dobson* v. *Commissioner,* 320 U. S. 489.

Neither the Tax Court nor the Third Circuit attempted any definition of the term "recapitalization" as applicable to the instant transaction. That it was at least in part a recapitalization is not questioned, but the crucial question is whether it was a recapitalization in the crucial sense that it resulted in a "non-taxable reorganization" under § 112 of the Revenue Act of 1936.

At about the same time of its decision in the instant case, the Third Circuit decided the cases of *Bazley* v. *Commissioner* (now pending in this Court on a petition for a writ of certiorari as No. 287 for the October Term 1946), and *Adam* v. *Commissioner* (now pending in this Court on a petition for a writ of certiorari as No. 209 for the October Term 1946). In both of those cases the purpose of the transaction was deemed basic or crucial to the issue whether the transaction was a taxable or non-taxable reorganization; that is to say, if the purpose was primarily to benefit the stockholders, then the dividend though paid in stock would be taxable; but if the purpose was primarily for the benefit of the corporation, then the entire transaction would be a non-taxable reorganization.

In the case at bar the Tax Court made no finding whether the purpose of the plan was for the benefit of the stockholders or primarily for the benefit of the corporation, nor did the Tax Court or the Third Circuit comment, to any extent whatever, regarding the importance of the purpose as affecting the question of the taxability of the stock dividend.

Accordingly, there is a lack of consistency within the same circuit as to the legal principles involved in the case at bar and in the *Bazley* and *Adam* cases.

Actually there is nothing inherently difficult about a transaction, which could properly be called a recapitalization, being in part a recapitalization and in part a payment of dividends, nor is there anything inherently difficult about such a transaction being in part for the benefit of the corporation and in another distinct part being for the benefit of the stockholders. If the transaction in the instant case had varied only in that the dividends were paid in cash, the fact that the balance of the plan constituted a recapitalization (even though wholly for the benefit of the corporation) would not prevent the dividend from being taxable. Accordingly, whether the stock dividend is or is not taxable should depend on the nature of the dividend and not on the nature of the other features of the transaction. The same observation would be true as to the purposes of the transaction. The exchange of new 6% stock for old 7% stock may very well have been for the benefit of the corporation and in order to improve its financial picture. The payment of the stock dividend, however, was none the less primarily in the interest of the stockholders and not only merely in the interest of the 7% stock but at least equally in the interest of the common stock, because such payment of the accumulated arrears on the 7% stock enabled the corporation to resume dividends on the common stock.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, Ch. 229, Sec. 1, U. S. Code Title 28, Section 347) and Section 1141 of the Internal Revenue Code.

The judgment of the Circuit Court of Appeals was entered April 18, 1946. By order of this Court the time for filing the petition for writ of certiorari was extended to September 15, 1946.

QUESTIONS PRESENTED.

1. Are the 7% stockholders who received a regularly declared dividend payable in the 6% stock to avoid an income tax thereon—with a corresponding denial of a dividend-paid credit to the corporation—merely because simultaneously or concurrently with the payment of such stock dividend the 7% stockholders exchanged their old stock for new 6% stock?

2. Is the aforesaid regularly declared stock dividend to be non-taxable to the recipients—with a corresponding denial of a dividend-paid credit to the corporation—merely by a characterization of the entire transaction (consisting of the declaration and payment of a dividend as well as the exchange of stock for stock) as a "recapitalization," despite the definition by the Supreme Court of the term "recapitalization" (*Helvering* v. *Southwest Consolidated Corporation,* 315 U. S. 194), as merely any "reshuffling of a capital structure within the framework of an existing corporation"?

3. Is the entire transaction consisting of two parts as aforesaid, a "recapitalization" in the sense that the regularly declared and paid stock dividend is non-taxable where the stockholders receiving the same thereby obtained a new and greater interest in the corporation than that previously possessed?

4. Where the directors of a corporation specifically declare a dividend on preferred stock, payable in preferred stock of the same corporation, but of a different issue, and in payment of accumulated arrears of dividends, and where the earned surplus against which such dividends are declared has been transferred to capital, and where the stockholders have accepted such stock dividend in payment of such accumulated arrears, does *Dobson* v. *Commissioner, supra,* or any other enunciation of principles by this Court endow the Tax Court with authority to disregard such evidence and to find as a fact that the aforesaid accumulated

arrears of dividends were thereby merely "eliminated" instead of being paid? Of course, the satisfaction of dividends in any form whatsoever, including payment in cash, is an "elimination" thereof in the sense that the obligation of the corporation with respect thereto is thereby discharged.

5. Is it essential to a determination whether the dividend payment feature of the transaction is taxable or non-taxable to the stockholders, to determine first whether the purpose of either the dividend feature of the transaction, or the transaction as a whole, was to benefit the stockholders or to benefit the corporation? If so, was it not the duty of the Tax Court to find as a fact, under the principles of *Dobson* v. *Commissioner, supra,* whether the purpose was to benefit the stockholders or the corporation? And was it not also the duty of the Third Circuit to review any such finding of fact or to make such finding if the Tax Court omitted to do so?

REASONS FOR ALLOWANCE OF THE WRIT.

I. This case involves important questions of Federal law which have not been but should be settled by this Court.

The decisions of this Court in *Koshland* v. *Helvering,* 298 U. S. 141, and *Helvering* v. *Gowran,* 302 U. S. 238, altered the entire concept of the taxation of stock dividends, as a result of which Congress amended the Revenue Laws in 1936, so as, for the future, to tax stock dividends under the conditions stated as follows in *Helvering* v. *Sprouse,* 318 U. S. 604, paraphrasing from the opinion in *Koshland* v. *Helvering, supra:*

> "To render the dividend taxable as income, there must be a change brought about by the issuance of shares as a dividend whereby the proportionate interest of the stockholder after the distribution was essentially different from his former interest."

In the case at bar the 7% stockholders received in payment of their accumulated dividends of $30 per share, .3 of a share of new 6% stock of a determined value of $89 per share. This new 6% stock, received in payment of accumulated arrears of dividends, unquestionably gave the recipient thereof a "proportionate interest" in the corporation "essentially different from his former interest."

The relative proportionate interests of both classes of stock, the 7% stock and the common stock, was essentially and materially changed by the event. The dividend so paid was charged against earned surplus and earned surplus in a corresponding amount was transferred to capital, thus increasing the interest of the 7% stock in the corporation at the expense of the common stockholders. Nevertheless, and in contravention of *Helvering* v. *Sprouse* and *Koshland* v. *Helvering, supra,* the Tax Court and the Third Circuit held that the dividend was not taxable because the transaction constituted a "recapitalization." However, neither court attempted a legal definition of the term "recapitalization" as applicable to the facts in the instant case.

Since every stock dividend necessarily involves a change in capital of one kind or another, it necessarily also involves a recapitalization in one sense or another. But under the *Koshland* and *Gowran* cases it is not every recapitalization that will avoid the taxability of a stock dividend to the recipients.

If the contrary were true no stock dividend payable in the stock of the corporation owing the dividend could ever be taxable because every such stock dividend involves a recapitalization in some sense.

The foregoing is not inconsistent with the decisions of this Court holding stock dividends non-taxable where, as in *Helvering* v. *Griffiths,* 318 U. S. 371, there was a stock dividend payable in common stock to a common stockholder; or where as in *Strassburger* v. *Commissioner,* 318 U. S. 604, there was a stock dividend, so-called, payable in preferred stock to the sole holder of all of the common stock.

In each of the cases just mentioned "the proportionate interest of the stockholder after the distribution was" *not* "essentially different from his former interest". In the case at bar the preferred stockholders were in almost all cases wholly different persons from the common stockholders and, wherever they were the same persons, they held preferred stock in different proportions from their holdings of common stock.

While no adjudicated case has involved the taxability of a stock dividend paid to preferred stockholders in preferred stock, the taxability of such a dividend is supported by such writers as Mertens (Law of Federal Income Taxation, Vol. 1, page 641) and Magill (Taxable Income, 1936 Edition, page 48).

Dividends on the preferred stock may not be paid in any medium other than cash except with the consent in each instance of each individual stockholder. Such consent was obtained in the instant case from practically 100% of the 7% stockholders. The payment of accumulated arrears of dividends in stock, pursuant to such necessary consent, was not a recapitalization within any logical definition of that term as used and intended by Congress in its legislation relative to non-taxable reorganizations. And neither the Tax Court nor the Third Circuit offered any definition of the term which would make a stock dividend non-taxable under the facts of this case.

The question when a stock dividend, paid in preferred stock to preferred stockholders, does or does not "alter the proportionate interest of the stockholder" so as to be taxable or non-taxable, is of sufficient importance to merit consideration and decision thereof by this Court, the precise question never having been heretofore passed upon by it.

The petitioner deems it highly important and a matter of public interest that this Court decide whether a stock dividend otherwise taxable shall avoid taxability because the declaration and payment of the dividend is the whole,

or even a part, of a transaction which may be termed recapitalization in some sense or other.

II. The decision herein is in conflict with other decisions of the Third Circuit and of the Tax Court now pending before this Court on applications for writs of certiorari.

In the cases of *Bazley, supra,* and *Adams, supra,* the Third Circuit by a divided court *en banc* determined that the stock dividends in those cases were taxable to the stockholders because the purpose thereof was to benefit the stockholders as distinguished from a corporate business purpose. In the instant case the petitioner contends that the primary purpose of the stock dividend here involved was to benefit not only the 7 per cent preferred stock but the common stockholders as well, because only by such means was it possible for the corporation, in its then financial state, to resume the payment of dividends on the common stock and thereafter to pay dividends on the new 6 per cent preferred. However, as stated already, neither the Tax Court nor the Third Circuit made any finding of fact as to whether such payment of a stock dividend, in this case, was for the benefit of the stockholders or of the corporation.

It would seem axiomatic, however, that any payment of a dividend, whether in cash or in stock, and whether or not such payment was necessary to the future resumption of cash dividends, must be for the benefit of the stockholders. It could not benefit the corporation unless perhaps incidentally.

The record shows that since the transaction here involved and the discharge by the corporation of its obligation with respect to the accumulated arrears of dividends on the 7 per cent stock by the payment thereof in 6 per cent stock, the payment of cash dividends was resumed and has continued to the present time.

Many of the former holders of the 7 per cent stock reside within the Third Circuit. Income taxes were collected

from them on account of this stock dividend pursuant to a ruling by the Commissioner that the stock dividend was taxable to them. If this stock dividend is now held non-taxable all of these stockholders should be entitled to recover the taxes so paid with respect thereto. If the Tax Court and the Third Circuit are reversed on this point numerous actions by such stockholders for the recovery of the taxes so paid may be avoided.

III. The decision herein by the courts below is in conflict with applicable decisions of this Court.

In *Koshland* v. *Helvering, supra,* and *Helvering* v. *Gowran, supra,* this Court held stock dividends to be taxable to the recipients where they received thereby a proportionate interest essentially different from their former interest. Inconsistently with and in contravention of those decisions the lower courts have held this stock dividend non-taxable merely because the transaction with which it was connected or with which it was simultaneous or concurrent was a recapitalization in some sense not defined by either Court.

Unless this issue of the taxability or non-taxability of a stock dividend in connection with a recapitalization is clarified by this Court, every sort and kind of stock dividend otherwise taxable can avoid taxation by the simple device of involving it with some kind of recapitalization. This result would be not only a repudiation of the decisions of this Court in the *Koshland* and *Gowran* cases, but it would defeat the clear intention of Congress, as expressed

in all Revenue Laws since 1936, that all stock dividends shall be taxed to the extent that they constitute income under the amendment to the Constitution.

And your petitioner will ever pray, etc.

THE OKONITE COMPANY,
Petitioner.

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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 160a–178a) is reported in 4 T. C. 618. The opinion of the circuit court of appeals (R. 181–189) is reported in 155 F. 2d 248.

JURISDICTION

The judgment of the circuit court of appeals was entered on April 18, 1946 (R. 190). By order of the Chief Justice, dated July 17, 1946, the time for filing a petition for a writ of certiorari was extended to September 15, 1946 (R. 191). The petition for a writ of certiorari was filed on Sep-

tember 14, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the record warrants the conclusion by the Tax Court that the distribution to its stockholders by taxpayer corporation of its 6% preferred stock in exchange for its 7% preferred stock constituted, as the Commissioner contends, an integrated transaction of reorganization by recapitalization within the meaning of Section 112 of the Revenue Act of 1936, with respect to which taxpayer may not have a dividends paid credit, and not, as taxpayer contends, a severable transaction including as one of its steps payment of a taxable stock dividend, on the basis of which taxpayer might be entitled to a dividends paid credit.

STATUTES INVOLVED

The pertinent provisions of the Revenue Act of 1936 are set forth in the Appendix, *infra*, pp. 12–15.

STATEMENT

This controversy involves deficiencies in income tax for 1936 and 1937, and in excess profits tax for 1937 (R. 178a–179a). The Tax Court made findings of fact, as follows:

Taxpayer is a New Jersey corporation, engaged since 1878 in the manufacture and sale of insu-

lated wires and cables (R. 162a). In 1927, in order to raise sufficient money to purchase a similar business of another company and for other purposes, taxpayer issued and sold $2,000,000 face amount, fifteen year, 5½% sinking fund debentures, and $1,000,000 par value 7% cumulative preferred stock (R. 163a). The bonds carried minimum sinking fund provisions of $70,000 annually (R. 163a), and the preferred stock of $40,000 annually (R. 166a).

In 1934, taxpayer was feeling the effects of the depression. It had operated at a loss for each of the three preceding years, and, because of the sinking fund requirements, it was being drained of cash and its credit with the banks was becoming impaired (R. 164a). To alleviate this condition, a plan was proposed to release the sinking fund provisions for the bonds, acceptance of which was optional with the holders (R. 164a–165a). On assenting bonds, the interest rate was increased from 5½% to 6% (R. 165a). In 1934, 77.2% of the bonds were deposited to evidence acceptance, enough to render the plan operative. For those who did not assent, the terms of the old agreement remained in effect. (R. 165a.) With respect to these 5½% bonds, while there was no deficiency at the end of 1937, there remained a deficiency of $14,000 in the sinking fund at the end of 1936 (R. 166a).

Prior to 1936, taxpayer's 7% preferred stock, issued as already stated in 1927, and consisting

of 10,000 shares of $100 par value, was entitled to 7% cumulative dividends before any dividends could be paid on taxpayer's outstanding 50,000 shares of common stock. The preferred stock was callable at $115 per share. (R. 166a.) Dividends were paid regularly by taxpayer upon both the preferred and common stock through October 1931, but from January 1932, continuously through December 10, 1936, the common stock dividends were passed. Moreover, dividends on the preferred stock was passed from May 1932, continuously through August 17, 1936.[1] (R. 166a–167a.)

Thus, in 1936, dividends on the preferred stock were in arrears in the amount of $31.50 per share. In addition, taxpayer was also in arrears with respect to the sinking fund requirements on the preferred stock, and was short of cash. Consequently, a plan was devised whereby the sinking fund provisions would be made less stringent and the arrears in dividends eliminated. (R. 167a, 174a.)

This plan, drafted September 24, 1936, was entitled (R. 168a):

> Plan and Agreement for Recapitalization, Exchange of 7% preferred stock for 6% preferred stock and Payment of Dividends in Arrears on 7% Preferred stock.

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[1] If four quarterly dividends were passed without payment on the preferred, the latter obtained share for share voting rights with the common, as was actually the situation from April 18, 1933, to April 20, 1937 (R. 121a–122a, 182).

On the day previous, taxpayer's certificate of incorporation had been amended to authorize a new class of 11,000 shares of $100 par value, 6% preferred stock, callable at $105 plus all unpaid dividends, in addition to the 7% preferred and common then outstanding. Dividends on the new 6% preferred were to be cumulative and prior to common. Sinking fund requirements were to be an amount equal to 10% net income after certain deductions. (R. 167a.) The plan, which was optional to the holders of the outstanding 7% preferred stock, offered (R. 168a)—

> to each holder of said stock the right to exchange each share of his seven per cent preferred stock of the Company for one share and 15/100ths of a share of the Company's new six per cent preferred stock, plus an extra dividend on each share of his seven per cent stock of one-tenth of a share of the Company's new six per cent preferred stock and in connection with such exchange, to receive in payment of all arrears of dividends up to and including the quarterly dividend period ending September 1, 1936, on each share of the seven per cent preferred stock exchanged as aforesaid, a stock dividend of three-tenths (3/10ths) of a share of new six per cent stock of the Company at par.

All the shares of the 7% stock so exchanged were to be retired and canceled. Toward the end of 1936, the plan became operative upon the acceptance of its terms and exchange by holders of 6,824

shares of the 7% preferred stock out of a total of 6,952 outstanding shares. (R. 168a.) The remaining small amount of outstanding 7% stock was retired, part in 1936 and part in 1937, by payment of accumulated dividends in cash and redemption at the call price of $115 a share (R. 169a). Dividend and sinking fund requirements for the 6% stock were met by taxpayer for 1937 (R. 169a–170a).

The Tax Court held (R. 160a–178a) that the transaction arising out of the agreement of September 24, 1936, constituted a recapitalization of the taxpayer and was therefore a reorganization within the meaning of Section 112 of the Revenue Act of 1936; that the 6% preferred stock received in payment of all arrears of dividends was received pursuant to the plan of reorganization and not as a taxable stock dividend, and that, under Section 27 (h) of the Revenue Act of 1936, the taxpayer was not entitled to a dividends paid credit. The circuit court of appeals affirmed (R. 181–189).

ARGUMENT

1. The decision below is clearly correct and raises no novel nor important question. Without dispute, the transaction involved a recapitalization to the extent of the exchange of the 1.15 shares of 6% preferred for each share of 7% preferred stock (R. 175a, 185). Moreover, to the extent that a recapitalization is involved, the transaction clearly falls within the statutory definition of a

nontaxable reorganization (Revenue Act of 1936, Sec. 112 (a), (b) (2) and (3), and (g) (1) (D); Appendix, *infra,* pp. 12–13), and constitutes a nontaxable distribution in the hands of stockholders with respect to which Section 27 (h) (Appendix, *infra,* p. 12) explicitly disallows a dividends paid credit. Taxpayer claims, however, the existence of a transaction separable from the recapitalization in that the .4 of a share of 6% preferred stock, included in the exchange for the 7% stock under the plan, in addition to the 1.15 shares of 6% preferred stock, constituted a stock dividend taxable under Section 115 (a), (f) and (g) (Appendix, *infra,* pp. 13–15), and hence authorized a dividends paid credit under Section 27 (a) and (e) (Appendix, *infra,* p. 12). On the contrary, the Tax Court found the fact to be (R. 177a)—

> that the consideration for the exchange of each share of 7 per cent stock was the receipt of 1.55 shares of 6 per cent stock and that it can not be separated into two or more independent steps.

In the absence of controlling statute or regulations, whether the transaction is to be regarded as entire or severable was correctly held by the court below to constitute a factual issue directly ruled by the *Dobson* case [2] to be a matter within the province of the Tax Court (R. 185). The record and, in particular, the terms of the re-

[2] *Dobson* v. *Commissioner*, 320 U. S. 489, 502, rehearing denied, 321 U. S. 231.

organization plan in the light of taxpayer's financial situation, afford ample support for the factual conclusion of an integrated rather than a severable transaction, which the Tax Court reached (R. 177a, 185–186). Thus, though purportedly the plan paid a dividend on the 7% stock (R. 168a), a 7% stockholder received no "stock dividend" unless he accepted the plan; he could not retain his 7% stock and receive the "dividend" (R. 177a, 186). Furthermore, the circumstances which evoked the plan are consistent with a single and not a separate character: Extrication of taxpayer from its financial predicament due to heavy past obligation and future commitment for dividends and sinking fund payments plus short cash position. The inference is reasonable that all of the 6% stock was distributed in exchange and in compensation for the surrender of rights in 7% stock. The result below is further confirmed by the similar conclusions reached in other cases based upon analogous factual situations. *Skenandoa Rayon Corp.* v. *Commissioner,* 122 F. 2d 268 (C. C. A. 2d), certiorari denied, 314 U. S. 696; *Morainville* v. *Commissioner,* 135 F. 2d 201 (C. C. A. 6th); *Knapp-Monarch Co.* v. *Commissioner,* 139 F. 2d 863 (C. C. A. 8th).

Taxpayer's argument (Pet. 7–10) fails to recognize that Sections 112 and 115 are contained in the same statute and are to be interpreted consistently. Thus, the statute contemplates that a *bona fide* reorganization, falling within the non-

recognition provisions of Section 112 (compare *Gregory* v. *Helvering,* 293 U. S. 465), constitutes an exception, among others, to the terms of Section 115 (a), (f) and (g), dealing with stock dividend distributions. This appears plainly in the language of Section 115 (h) (Appendix, *infra,* p. 15), which, so far as pertinent, reads:

> The distribution * * * to a distributee by or on behalf of a corporation of its stock * * * shall not be considered a distribution of earnings or profits of any corporation—
>
> (1) if no gain to such distributee from the receipt of such stock or securities was recognized by law, * * *.

Once the transaction is, as here, found as a matter of fact to be entire and not severable, Section 112 forestalls recognition of gain or loss from any part of the exchange of securities included in the reorganization which are issued by a corporate party to it; stock distributions incident thereto are for that reason nontaxable and no issue can arise, such as taxpayer seeks here to assert (Pet. 9, 11), as to whether or not the stock distribution alters the proportionate interest of the stockholders.

2. There is no inconsistency between the decision of the court below in the instant case and its decisions in *Bazley* v. *Commissioner,* 155 F. 2d 237, petition for certiorari pending, No. 287, this Term, and *Adams* v. *Commissioner,* 155 F. 2d 246, petition for certiorari pending, No. 209,

this Term.[3] In the cited cases, the court below held that Congress, in Section 112, did not intend to exempt all "reorganizations" from tax consequences, but only those which are required by corporate business exigencies or undertaken for reasons germane to the continuance of the business of a corporation, a party to the reorganization.[4] Consistently with this holding, the court below, contrary to the assertion made by the taxpayer in its petition (pp. 4–5, 10), applied to the instant record the legal standard enunciated in the cited cases, and referring to the *Bazley* case, expressly ruled that the facts found by the Tax Court show a statement of *corporate* purpose (R. 181–183). The findings of the Tax Court that taxpayer's certificate of incorporation was amended to permit the adoption of the reorganization plan whereby arrears on preferred stock would be eliminated (R. 167a) and the sinking fund provisions made less stringent (R. 174a), and its additional findings that taxpayer was feeling the effects of the depression (R. 164a) and was in a short cash position (R. 167a), clearly support the holding of the court below. Since the reorganization here, unlike the factual situations in the *Bazley* and *Adams* cases, possesses clear business purpose ger-

[3] These decisions were rendered by a divided court on April 16, 1946, two days previous to the decision here (R. 190).

[4] *Bazley* v. *Commissioner*, *supra*, pp. 242–244; *Adams* v. *Commissioner*, *supra*, p. 247. Compare Treasury Regulations 94, promulgated under the Revenue Act of 1936, Art. 112 (g)–1 and Art. 112 (g)–2.

mane to corporate continuance, the additional circumstance that the plan may also have served business interests personal to taxpayers' stockholders is surplusage. Thus the issue involved in the cited cases, upon which the court below divided,[5] is not here present.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

SEWALL KEY,
Acting Assistant Attorney General.

ROBERT N. ANDERSON,

I. HENRY KUTZ,
Special Assistants to the Attorney General.

OCTOBER 1946.

[5] Indeed, two of the three judges joining in the instant decision dissented in the *Bazley* and *Adams* cases, in which five judges sat.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 27. CORPORATION CREDIT FOR DIVIDENDS PAID.

(a) *Dividends Paid Credit In General.*—For the purposes of this title, the dividends paid credit shall be the amount of dividends paid during the taxable year.

* * * * * * *

(e) *Taxable Stock Dividends.*—In case of a stock dividend or stock right which is a taxable dividend in the hands of shareholders under section 115 (f), the dividends paid credit with respect thereto shall be the fair market value of the stock or the stock right at the time of the payment.

* * * * * * *

(g) *Preferential Dividends.*—No dividends paid credit shall be allowed with respect to any distribution unless the distribution is pro rata, equal in amount, and with no preference to any share of stock as compared with other shares of the same class.

(h) *Nontaxable Distributions.*—If any part of a distribution (including stock dividends and stock rights) is not a taxable dividend in the hands of such of the shareholders as are subject to taxation under this title for the period in which the distribution is made, no dividends paid credit shall be allowed with respect to such part.

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of

the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely In Kind.*—

* * * * *

(2) *Stock For Stock Of Same Corporation.*—No gain or loss shall be recognized if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(3) *Stock For Stock On Reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of a plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * *

(g) *Definition of Reorganization.*—As used in this section and section 113—

(1) The term "reorganization" means * * * (D) a recapitalization, * * *.

* * * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definitions Of Dividend.*—The term "dividend" when used in this title (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without

regard to the amount of the earnings and profits at the time the distribution was made.

* * * * *

(f) *Stock Dividends.*—

(1) *General Rule.*—A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution.

(2) *Election of Shareholders as to Medium of Payment.*—Whenever a distribution by a corporation is, at the election of any of the shareholders (whether exercised before or after the declaration thereof), payable either (A) in its stock or in rights to acquire its stock, of a class which if distributed without election would be exempt from tax under paragraph (1), or (B) in money or any other property (including its stock or in rights to acquire its stock, of a class which if distributed without election would not be exempt from tax under paragraph (1)), then the distribution shall constitute a taxable dividend in the hands of all shareholders, regardless of the medium in which paid.

(g) *Redemption of Stock.*—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumu-

lated after February 28, 1913, shall be treated as a taxable dividend.

(h) *Effect on Earnings and Profits of Distributions of Stock.*—The distribution (whether before January 1, 1936, or on or after such date) to a distributee by or on behalf of a corporation of its stock or securities or stock or securities in another corporation shall not be considered a distribution of earnings or profits of any corporation—

(1) if no gain to such distributee from the receipt of such stock or securities was recognized by law, or

(2) if the distribution was not subject to tax in the hands of such distributee because it did not constitute income to him within the meaning of the Sixteenth Amendment to the Constitution or because exempt to him under section 115 (f) of the Revenue Act of 1934 or a corresponding provision of a prior Revenue Act.

As used in this subsection the term "stock or securities" includes rights to acquire stock or securities.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 501

THE OKONITE COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR REHEARING.

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, The Okonite Company, by Edmund S. Kochersperger, its attorney of record, and presents this, its Motion for Rehearing (or Reconsideration) on its Petition for a Writ of Certiorari in the above-entitled cause for the reasons hereinafter stated.

Jurisdiction.

The jurisdiction of this Honorable Court is set out on page 5 of the Petition for a Writ of Certiorari.

On September 14, 1946, the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit was filed; and on October 28, 1946, the same was denied by this Honorable Court.

Questions Presented.

The fundamental legal question sought for a review by this Honorable Court is basically the same as in two other cases now pending (October Term, 1946) for consideration by this Honorable Court by the granting of Writs of Certiorari on October 14, 1946 in *Adam A. Adams* v. *Commissioner,* Docket No. 209, and *J. Robert Bazley* v. *Commissioner,* Docket No. 287, both cases being upon petitions relative to decisions in the same Third Circuit.

The decisions in the three cases find consecutive reporting in 155 Fed. (2d) at pages 237 to 246 as to *J. Robert Bazley* v. *Commissioner,* at pages 246 to 248 as to *Adam A. Adams* v. *Commissioner,* and at pages 248 to 254 as to *The Okonite Company* v. *Commissioner.*

The decisions in the cases of *Bazley, supra,* and *Adams, supra,* were rendered by the Third Circuit sitting as *court en banc* comprising five judges, with decisions rendered on the same date, April 16, 1946, and with expression of majority and minority views by the Judges of that Court. The decision in the case of *The Okonite Company, supra,* was rendered two days later (April 18, 1946) by a court comprising three judges, and by a specific reference (155 Fed. (2d) 250) in the opinion to the previous decision in the *Bazley* case, *supra,* the unanimous decision by the Court (in the case of this petitioner, The Okonite Company) would appear to find basis in the doctrine of *stare decisis.*

The facts in all three cases are identical in one aspect, namely, each case involved a financial recapitalization in

the different respective corporations. The facts differ inasmuch as the securities received by stockholders in cases of *Bazley* and *Adams* as something additional to the previous holdings of stock were described as "debentures," whereas in the instance of this petitioner, The Okonite Company, similar additional securities found the description as "preferred stock."

The decisions by The Tax Court and by the Third Circuit hold for the taxability as to the "debentures" received in cases of *Bazley, supra,* and *Adams, supra,* but hold for the nontaxability of the "preferred stock" received in the case of *The Okonite Company, supra.* Neither The Tax Court nor the Third Circuit (in case of *The Okonite Company*) emphasizes the contrary or conflicting conclusions by any attempt at distinction between "debentures" and "preferred stock" in terms of taxable or nontaxable consequences to stockholders by reason of such difference in name for the securities received as additional to the former holding by stockholders.

From counsel's examination of the petitions for writ of certiorari in the cases of *Bazley, supra,* and *Adams, supra,* as to which this Honorable Court has granted the respective writs, counsel deferentially suggests that this Honorable Court appears to have taken jurisdiction for the consideration and the rendition of a final judgment regarding a basic and important question of law—

> Is a corporate recapitalization to be denied the nontaxable consequences under Section 112 of the Internal Revenue Code by force of a finding of fact by The Tax Court that the purpose of the recapitalization was *to benefit the stockholders* in distinction from a *corporate business purpose*?

When the case of *The Okonite Company* was decided in The Tax Court (January 29, 1945), the decision was that of Van Fossan, J. *without any review by the full Court* (see 4 T. C. 618), the petitioner's motion to the presiding judge in The Tax Court for such a review being denied (Record, 2a), and denial also occurred of petitioner's motion addressed to Judge Van Fossan for reconsideration and for correction in findings of fact. (Record, 2a.) Those denials occurred on February 27, 1945. (Record, 2a.) *The day following those denials,* the Tax Court announced its decision in the case of *J. Robert Bazley,* 4 T. C. 897, holding *by a divided court upon review* that the purpose of any recapitalization is crucial to the taxable or the nontaxable results, taxable if to benefit stockholders and nontaxable if for corporate business purpose. At 4 T. C. 907, the name of Judge Van Fossan may be noted as disagreeing with that conclusion of the majority of Tax Court Judges.

Judge Van Fossan *made no specific finding of fact as regards the purpose of the recapitalization* in the instance of his decision against *The Okonite Company,* 4 T. C. 618, although the evidence clearly showed *purpose in terms of benefit to the stockholders,* inasmuch as by the payment of dividend-arrears by preferred stock, the payment of cash dividends thereby could be (and was) resumed to both preferred stockholders and common stockholders alike.

Whether or not the *Bazley* case stood under "review by the court" when Judge Van Fossan rendered his decision against this petitioner on January 29, 1945 does not stand disclosed to the public, but such a review must have been in process on February 27, 1945 (when the two motions were denied in The Tax Court to The Okonite Company), inasmuch as the decision in the *Bazley* case finds rendition on February 28, 1945 (4 T. C. 897).

If the purpose of a corporate recapitalization is crucial to the taxable or the nontaxable results, the same basic question stands in the case of the petitioner as in the cases of *Bazley, supra,* and *Adams, supra,* as to which this Honorable Court has granted certiorari.

Reasons for Granting the Motion and, by Rehearing, for Granting the Writ.

Sufficient reasons for prevention of a grave miscarriage of Justice would appear to find recital under the foregoing subject heading.

That Judge Van Fossan did not make any specific finding of fact regarding the purpose of the recapitalization, where the evidence so clearly showed purpose in terms of benefit to stockholders, most obviously is consistent with his dissenting view finding expression in the *Bazley* case (4 T. C. 897, at 909) that *purpose holds no importance.* But it is not consistent with the majority views expressed respectively by The Tax Court and the Third Circuit in the *Bazley* case, *supra.* (Petitioner's efforts for correction in the Third Circuit proved futile.)

When applying the decision in the *Bazley* case, under the doctrine of *stare decisis,* to the case of petitioner, The Okonite Company, the opinion by the Third Circuit describes as "a statement of corporate purpose" (Record, p. 183) the fact that the dividend-arrearages were "eliminated" by the process of *payment* through the delivery of the preferred stock as additional to the stockholders' previous holdings of stock. Equally, as a corporate purpose in the *Bazley* and *Adams* cases, the capitalization of Surplus into debentures "eliminated" possibility for payment of cash dividends out of Surplus.

It is fundamental in corporate financing that any accumulation of preferred dividends in arrears is *not a corporate liability* finding appearance among liabilities on a balance sheet. It is a *preference* as against the interest and the rights of the *common stockholders*, who may be debarred of any cash dividends being paid to them until the preferred stockholders are satisfied and, upon a corporate liquidation, funds redound to the common stockholders only after such complete satisfaction to the prefered stockholders. Even in any sense of "elimination" as a legal conclusion, the benefit is to the common stockholders, just as the evidence showed in the case of The Okonite Company (Record, pp. 102a, 103a, and 104a) that cash dividends immediately were resumed to the common stockholders, and continued thereafter, and with cash dividends thereafter being paid to all preferred stockholders as well (Record 103a, 104a.)

If the payment of the dividend arrearage in the case of The Okonite Company had been made by debentures, instead of by a new preferred stock, the comparison with facts in the cases of *Bazley*, *supra*, and *Adams*, *supra*, would make identical situations (and exactly opposite conclusions)—with a single difference that there were specific declarations of dividends and charges against surplus earnings in the instance of The Okonite Company (with a decision for nontaxability), whereas the stockholders in the *Bazley* and *Adams* cases experienced taxability even though there were no declarations as dividends and *no* charges against Surplus.

Thus, it impresses counsel that if the decision in the case of The Okonite Company is denied consideration by this Honorable Court, and if the decisions in the *Bazley* and *Adams* cases are affirmed taxpayers in general defi-

nitely will be informed that taxes to stockholders may be avoided by the process of preferred stock payments, whereas taxes could not be avoided by resort to debentures.

Except for the absence of an expressed and definite future maturity date, the preferred stock involved as to The Okonite Company bore similarity to debentures; the stock was redeemable through a sinking-fund by percentage relative to earnings and was callable at the fixed price of $105.00 per share relative to par value of $100.00 per share.

If it should be the decision by this Honorable Court in the *Bazley* and *Adams* cases, *supra*, that the *purpose* of any corporate recapitalization is crucial and controlling as to taxability or nontaxability, then the ends of Justice would necessitate that the case of this petitioner be remanded to The Tax Court for the making of findings of facts as to purpose, consistent with, and supported by, the evidence.

To the ends of Justice aforesaid, it would appear fitting that counsel for this petitioner have the same opportunity for argument before this Honorable Court on the question of the taxability as to dividends paid by preferred stock, by the granting of writ of certiorari in this case, as now stands accorded to counsel for the Commissioner-respondent relative to the taxability as to dividends paid by debentures through the said granting of writ of certiorari in the cases of *Bazley*, *supra*, and *Adams*, *supra*.

The *Bazley* and *Adams* cases were decided by a full bench of five Judges (Circuit Judges Biggs, Maris, Goodrich, McLaughlin and O'Connell). Three of those five Judges agreed that the distribution of the debentures made in the *Bazley* and *Adams* cases was a dividend, taxable as such to the stockholders, for the reason that the distribution was primarily for the benefit of the stockholders.

Circuit Judges Maris and Goodrich dissented because they felt that the presence or absence of a "corporate purpose" is immaterial and that a recapitalization is a tax free reorganization whether it served the interest of the corporation or of the stockholders.

The significant point and the point which may have been overlooked upon the first consideration of this application is that the instant case was argued before and decided by a Court of three Judges (Circuit Judges Biggs, Maris and Goodrich), two of whom were the minority in the *Bazley* and *Adams* cases. The opinion below was written by Circuit Judge Goodrich of this minority.

Thus the minority in the *Bazley* case controlled the decision in the *Okonite* case. Under these circumstances a further inquiry would serve Justice.

Prayer.

WHEREFORE, petitioner prays that its Motion for Rehearing of its Petition for a Writ of Certiorari herein may be granted; and that upon reconsideration, this Honorable Court may vacate its order entered herein on October 28, 1946, and may enter a new order granting the Petition for a Writ of Certiorari in this cause.

Respectfully submitted,

THE OKONITE COMPANY

By EDMUND S. KOCHERSPERGER,
811 Investment Building,
Washington 5, D. C.
Counsel for Petitioner.

Certificate of Counsel.

The undersigned, counsel for petitioner herein, hereby certifies that the foregoing Motion for Rehearing is presented in good faith as the honest opinion of counsel that the subject matter merits consideration by this Honorable Court and that counsel's action is not in any sense motivated by any thought or desire for delay.

EDMUND S. KOCHERSPERGER,
811 Investment Building,
Washington 5, D. C.
Counsel for Petitioner.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 501.

THE OKONITE COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING AND PETITION THEREON.

EDMUND S. KOCHERSPERGER, *Esq.*,
811 Investment Building,
Washington 5, D. C.,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 501.

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING AND PETITION THEREON.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

COMES Now the petitioner, The Okonite Company, by Edmund S. Kochersperger, its attorney of record, and presents this, its Motion for Leave to File Second Petition for Rehearing out of time, and Petition Thereon, relative to Petition for a Writ of Certiorari heretofore denied.

Jurisdiction.

The jurisdiction of this Honorable Court is set out on page 5 of the Petition for a Writ of Certiorari.

Reasons for Granting the Motion and, by Reconsideration, for Granting the Writ.

For the prevention of counsel's conception of a grave miscarriage of justice, attention is directed to decisions rendered by this Honorable Court on June 16, 1947 in the cases of *J. Robert Bazley* v. *Commissioner,* No. 287, and *Adam A. Adams* v. *Commissioner,* No. 209, for the pertinency of the Opinion to this petitioner's Petition for Certiorari and to this petitioner's Motion for Rehearing, both standing of record within the October Term, 1946 as denied. Presentation of this Motion necessarily was delayed until rendition of said decisions.

The ends of justice would appear to require that this Honorable Court accord reconsideration to the prior denial of this petitioner's Petition for Writ of Certiorari and the denial of said Motion for Rehearing and, upon such reconsideration, to grant the Writ. Accordingly, the petitioner so moves, and for reasons which follow.

The case of this petitioner in The Tax Court was considered and decided by one Judge, without review by that Court *en banc.* That one Judge held that where stockholders received preferred stock to a substantial value determined by that Judge himself at $89.00 per share, there was a recapitalization of a *nontaxable* nature under Section 112.

The effect of that decision was to deny to this petitioner a deduction for dividends-paid credit as to dividends taxable to stockholders, despite the fact that the Commissioner by interpretation of the law in manner similar to the opinion now expressed in the *Bazley* and *Adams* cases, *supra,* previously had ruled that the dividends were taxable to stockholders of this petitioner, collected taxes from the stockholders, and still stands in possession of unre-

funded taxes collected from stockholders on the interpretation that the dividends were taxable to them.

By both our Petition for Certiorari and our Motion for Rehearing we emphasized the pertinency of the *Bazley* and *Adams* cases to our case. The Third Circuit delayed decision in our case until after its decisions in those other cases, rendering decision in our case two days after the others, and referring to the *Bazley* case in the decision rendered against this petitioner. Now that this Honorable Court has decided the *Bazley* and *Adams* cases upon reasoning that differs from the majority opinion by the Third Circuit in those other cases, that reasoning makes decisions in those other cases even more pertinent to the case of this petitioner.

The petitioner's Motion for Rehearing was filed after the Writ of Certiorari had been granted in the *Bazley* and *Adams* cases, with citation therein only by the Third Circuit's decision in *Bazley, Adams,* and *The Okonite Company* (as the petitioner's own case). The late filing of this petition thus is explained by the fact that, after denial of our Motion for Rehearing, we felt powerless to act until decisions had been rendered by this Honorable Court in the *Bazley* and *Adams* cases, deeming that earlier action on our part would be presumptive in face of the denial of our Motion for Rehearing.

Unless correction is made by this Honorable Court by application of the legal principles stated in the opinions in the *Bazley* and *Adams* cases, as now sustaining the Commissioner's collection of taxes from this petitioner's stockholders, the grave injustice will be done of an unauthorized double collection of taxes, in one instance (stockholders) because the dividends were "taxable" and in the other instance (corporation) because the dividends were "nontaxable," *upon the same identical situation as to facts.*

Language from the opinion in the *Bazley* and *Adams* cases as precluding any refunds to the petitioner's stockholders is pertinent to our situation:

> "It was not the purpose of the reorganization provision to exempt from payment of a tax what as a practical matter is realized gain."

The record in this case shows clearly the "realized gain" to substantial amounts as received by all of petitioner's stockholders, and as the basis for the Commissioner's collection of taxes from them. (See Petition for Certiorari, page 3.)

Again, declares the opinion:

> "A 'reorganization' which is merely a vehicle, however elaborate or elegant, for conveying earnings from accumulations to the stockholders, is not a reorganization under Section 112."

And, again, states the opinion:

> "In the case of a corporation which has undistributed earnings, the creation of new corporate obligations which are transferred to stockholders in relation to their former holdings, so as to produce, for all practical purposes, the same result as a distribution of cash earnings of equivalent value, cannot obtain tax immunity because cast in the form of a recapitalization-reorganization."

Those foregoing quotations effectually paraphrase the contentions advanced by this petitioner both in The Tax Court and before the Third Circuit, and with repudiation at those two stages of the litigation.

The record in this case shows votes by the petitioner's Directors "for conveying earnings from accumulations to the stockholders." That record also shows that petitioner had "undistributed earnings, the creation of new corporate obligations which are transferred to stockholders in relation to their former holdings, so as to produce, for all practical purposes, the same result as a distribution of cash earnings of equivalent value." That record shows (page 38a) that the resort to payment of dividends by "new corporate obli-

gations'' was necessitated because (as the President of the Company testified):

> ''We would like to have paid them in cash but we didn't have the cash to pay them in.''

The only apparent difference between this case and the cases of *Bazley* and *Adams, supra*, is that the payment was by preferred stock in our case, while by debentures in the others.

On the basis of the opinion in the *Bazley* and *Adams* case, the Commissioner can find justification for refusing refunds of taxes paid by our stockholders, by acceptance of the reasoning in this new opinion as being a repudiation by this Honorable Court of the opinions expressed in our case by both the single Judge of The Tax Court and the Third Circuit.

Petitioner's counsel would be negligent in his responsibility as a Member of the Bar of this Court, if he failed to address the attention of this Honorable Court to a situation involving a grave miscarriage of Justice, as matters now stand, and to accord opportunity to this Court for correction of the injustice.

All statements in the opinion for the *Bazley* and *Adams* cases characterize the preferred stock dividends in our case as being *taxable dividends*, contrary to the decision by The Tax Court and affirmed by the Third Circuit. By being dividends taxable to our stockholders, it merely is automatic that the dividends-paid credit applies.

If there be any distinction between ''debentures'' as a dividend and ''preferred stock'' as a dividend, that distinction merits consideration by this Court as being a most important legal question where decision is lacking. As matters now stand, the precedents by the three named cases hold the appearance as ''taxable'' when action is by ''debentures,'' but ''nontaxable'' when done by ''preferred stock,'' with the record in our case evidencing our ''preferred stock'' as being practically the same as ''deben-

tures." Unless clarification comes by decision of this Court in petitioner's case, nontaxable reorganizations readily may be arranged through "preferred stock," instead of by "debentures," a result which counsel deems would find disapproval by this Court if considered through the granting of the Writ in our case, but leaving that important question undecided by this Court if the Writ is not granted, while doing a grave injustice to this petitioner.

Prayer.

WHEREFORE, petitioner prays that its Motion for Leave to File Second Petition for Rehearing and Petition Thereon may be granted; and that upon reconsideration, this Honorable Court may vacate prior orders of denial, and may enter a new order granting the Petition for a Writ of Certiorari in this cause.

Respectfully submitted,

THE OKONITE COMPANY,

By: EDMUND S. KOCHERSPERGER,
811 Investment Building,
Washington 5, D. C.,
Counsel for Petitioner.

Certificate of Counsel.

The undersigned, counsel for petitioner herein, hereby certifies that the foregoing Motion is presented in good faith as the honest opinion of counsel that the subject matter merits consideration by this Honorable Court, and that counsel's action is not in any sense motivated by any thought or desire for delay.

EDMUND S. KOCHERSPERGER,
811 Investment Building,
Washington 5, D. C.,
Counsel for Petitioner.